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BEFORE THE ARIZONA CORPORATION CO

**COMMISSIONERS**

MIKE GLEASON, Chairman  
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JEFF HATCH-MILLER  
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AZ CORP COMMISSION  
DOCKET CONTROL

IN THE MATTER OF QWEST  
CORPORATION'S PETITION FOR  
ARBITRATION AND APPROVAL OF  
AMENDMENT TO INTERCONNECTION  
AGREEMENT WITH ARIZONA DIALTONE,  
INC. PURSUANT TO SECTION 252(b) OF  
THE COMMUNICATIONS ACT OF 1934 AS  
AMENDED BY THE  
TELECOMMUNICATIONS ACT OF 1996  
AND APPLICABLE STATUTES.

DOCKET NO. T-01051B-07-0693  
T-03608A-07-0693

Arizona Corporation Commission

**DOCKETED**

**STAFF'S BRIEF**

MAY 20 2008

DOCKETED BY

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The Arizona Corporation Commission ("Commission" or "ACC") Staff files the following brief statement on the issues in this case.

**I. BACKGROUND**

On December 17, 2007, Qwest Corporation ("Qwest") filed a Petition for Arbitration of unresolved issues arising from its interconnection agreement negotiations with Arizona Dialtone, Inc. ("AZDT") involving implementation of the Federal Communications Commission's ("FCC") latest Triennial Review Order ("TRO")<sup>1</sup>. In its Petition, Qwest raised the following five issues:

1. Whether the federal regulatory regime restricts the unbundling obligations that may be imposed upon ILECs in interconnection agreements arbitrated under Section 252.
2. Whether the scope of Qwest's unbundling obligations should be made conditional upon non-specific references to state or federal laws and regulations.
3. Whether the one-year transition period the *TRRO* provided for access to local circuit switching, including UNE-P services Arizona Dialtone uses to serve its embedded base of customers, commenced on the effective date of the *TRRO* and expired on March 10, 2006, and bar against UNE switching has been place since then, or whether the transition period starts upon the Effective Date of the *TRRO* Amendment.
4. Whether back billings to March 10, 2005 of the FCC ordered rate for embedded switching UNEs during the transition period, and back billing to March 10, 2006 of Commission approved resale PAL service rates, are impermissible as violations of the doctrine against retroactive ratemaking or as untariffed charges.

<sup>1</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al., CC Docket No. 01-3438, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (Released August 21, 2003) ("TRO").

1           5.     Whether in light of the national policy to implement the *TRRO* expeditiously issues  
2                 raised by either party that were not raised by the Request for Negotiations or that do  
3                 not flow directly from the *TRRO* should be deferred.

4           Qwest claimed in its Petition that AZDT positions for not entering into the *TRRO* Amendment  
5           are "utterly inconsistent with [the FCC's] orders, and are calculated to thwart and further delay those  
6           public policy objectives.

7           Simultaneously with the filing of its Petition for Arbitration, Qwest filed a Formal Complaint  
8           against Arizona Dialtone alleging that AZDT refused to transition from UNE-P services to alternative  
9           services as required by the *TRO* and *TRRO*<sup>2</sup> and refused to pay Qwest the legally prescribed rates for  
10          UNE-P used to serve embedded customers during the transition period, or the rates Qwest was  
11          permitted to charge for new alternative services after the transition period.

12          A hearing on Qwest's Petition for Arbitration was held on May 1, 2008 and May 7, 2008. At  
13          the hearing, Administrative Law Judge Sarah Harpring went through the issues raised by Qwest in its  
14          Petition as well as the issues raised by AZDT in its Response and obtained agreement from the  
15          parties as to the issues that had been resolved or deferred and the issues that remained outstanding.<sup>3</sup>  
16          As requested by ALJ Harpring at the May 7, 2008 hearing, Qwest and AZDT submitted a Joint  
17          Statement of Issues in Dispute in which Staff concurred.

18          Staff's brief statement on the issues presented in this case uses the Joint Statement of Issues in  
19          Dispute filed by Qwest and AZDT in which Staff concurred.

## 20       II.     DISCUSSION

21           A.     Issue 1: Whether the form of *TRRO* Amendment to be executed by Qwest and AZDT  
22                 should contain language allowing Qwest to back bill AZDT for the difference between  
23                 the UNE-P rate AZDT paid for switching services and the default "plus \$1" transition  
24                 rate set forth in the *TRRO* and FCC regulations, for the period from March 11, 2005 to  
25                 March 10, 2006.

26                 The sub-issues are as follows:

- 27                 1.     Qwest's claim that back billing of the default "plus \$1" transition rate is the  
28                         lawful rate and is appropriate to apply as a true-up under the *TRRO* and the  
29                         FCC's regulations.

30                 <sup>2</sup> *In the Matter of Unbundled Access to Network Elements, and Review of the Section 251 Unbundling Obligations of*  
31                 *Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, (Released  
32                 February 4, 2005)(*"TRRO"*).

33                 <sup>3</sup> Tr. at 6-24.

2. Qwest's claim that back billing for the transition period is justified under the "change of law" and "dispute resolution" provisions of the ICA.
3. AZDT's claim that back billing is not appropriate because Qwest and AZDT were operating under an "alternative arrangement" within the meaning of TRRO Para. 228. Within this claim the parties will address allegations and associated legal claims set out in Section I, paragraphs 3 through 7 in AZDT's Statement of Issues filed in this docket on April 4, 2008, although the parties do not necessarily expect that their discussions of those issues will be organized according to the listing in those paragraphs.
4. AZDT's claim that back billing is not appropriate because neither the "plus \$1 rate" nor the retroactive application of that rate have been filed with or approved by the Arizona Corporation Commission.
5. The parties may argue bad faith or refusal to negotiate in the context of the foregoing sub-issues.

From a legal perspective, Staff believes that Qwest is entitled to back billing of the default "plus \$1" transition rate for the period from March 11, 2005 to March 10, 2006 ("transition period"). Qwest is entitled to the back billing for the transition period pursuant to the FCC's *TRO* and *TRRO* and under the change of law provisions of its interconnection agreement ("ICA").

Qwest was authorized to change the "plus \$1" transition rate for the transition period by the FCC in its *TRRO*:

"We do, however, adopt the Interim Order and NPRM's proposal that unbundled access to local circuit switching during the transition period be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar."<sup>4</sup>

The procedure to accomplish implementation of the *TRO* and *TRRO* was to be through the Section 252 process utilizing the change of law provisions of the parties' existing ICA. The following is an excerpt from the relevant provisions of the FCC's *TRO*:

"Second, we believe that the section 252 process described above provides good guidance even in instances where a change of law provision exists. As under the default process described above, we expect that parties would begin their change of law process promptly. Once a contract change is requested by either party, we expect that negotiations and any timeframe for resolving the dispute would commence immediately. We also find that the section 251(c)(1) duty

<sup>4</sup> *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 et al. *Order on Remand*, (Released February 4, 2005).

1 to negotiate in good faith applies to these contract modification  
2 discussions, as they do under the section 252 process. Accordingly,  
3 any refusal to negotiate or cooperate with the contractual dispute  
4 resolution process, including taking actions that unreasonably delay  
5 these processes could be considered a failure to negotiate in good faith  
6 and a violation of section 251(c)(1).”

7 The parties’ ICA contained a change of law provision which is set forth in relevant  
8 part below:

9 “To the extent that the Existing Rules are changed, vacated, dismissed,  
10 stayed or modified, then this Agreement and all contracts adopting all  
11 or part of this Agreement, shall be amended to reflect such  
12 modification or change of the Existing Rules. Where the Parties fail to  
13 agree upon such an amendment within sixty (60) days from the  
14 effective date of the modification or change of the Existing Rules, it  
15 shall be resolved in accordance with the Dispute Resolution provision  
16 of this Agreement.”

17 The record demonstrates that numerous emails and letters went back and forth  
18 between Qwest and AZDT regarding the *TRO* and *TRRO* and its impact upon their ICA.<sup>5</sup> At  
19 one point, Qwest attempted to invoke the Dispute Resolution provision of its ICA, but AZDT  
20 stated that it believed the provision was not applicable.<sup>6</sup>

21 As discussed above, the FCC’s *TRRO* gave Qwest the right to charge a transition rate  
22 of “plus \$1” during the transition period. That AZDT refused to sign the *TRRO* Amendment  
23 for various reasons does not change this fact. AZDT argues that it should not now have to  
24 pay the “plus \$1” for the transition period because (1) it is “retroactive ratemaking,” (2) the  
25 “plus \$1” rate was never approved by the Commission, and (3) the parties were operating  
26 under an alternative arrangement. Staff does not agree with either of these arguments. First,  
27 the transition rate itself was set by the FCC back on February 4, 2005 and was to apply from  
28 the effective date of the Order (March 11, 2005) until March 10, 2006. The parties’  
correspondence establishes that AZDT had timely knowledge of the *TRO* and *TRRO* and the  
rate impacts resulting therefrom.<sup>7</sup> AZDT had no right to expect that it would not be subject to  
the transition period increase at that time or at any time subsequent thereto. Later events, in  
Staff’s opinion, do not absolve AZDT from this liability. This is not retroactive ratemaking.

<sup>5</sup> See Ex. Q-1, Q-2, Q-4-Q-17.

<sup>6</sup> See Ex. Q-7.

<sup>7</sup> See Ex. Q-1.

1 Second, the transition rate was in general tied to the rate set by the State commission.  
2 Approval by the Commission of the "plus \$1" rate authorized by the FCC would have taken  
3 place when the parties submitted their *TRRO* Amendment to the Commission. For voluntarily  
4 negotiated agreements, the Commission has 90 days to approve the agreement or it goes into  
5 effect by operation of law. AZDT should not be allowed to use its refusal to sign the *TRRO*  
6 Amendment to absolve it from having to pay the rate authorized by the FCC during the  
7 transition period.

8 Finally, Staff does not believe that the parties were operating under an "alternative  
9 arrangement". See Paragraph 228 of the *TRRO*. The alternative arrangement referred to in  
10 *TRRO* Paragraph 228 clearly contemplates that there is a meeting of the minds with respect to  
11 such an arrangement and that both parties have a common understanding about what that  
12 arrangement constitutes. That is clear from the following passage in the FCC's Order: "The  
13 transition mechanism adopted today also does not replace or supersede any commercial  
14 arrangements carriers have reached for the continued provision of UNE-P or for a transition to  
15 UNE-L."<sup>8</sup> In this instance, the correspondence between the parties does not establish the  
16 requisite meeting of the minds.<sup>9</sup> Indeed, it is clear to Staff that Qwest was merely suggesting  
17 that it was willing to continue to provide UNE-P to AZDT at current rates but those rates  
18 would be subject to increase to FCC authorized levels for the transition period once the parties  
19 reached agreement on the form of the Amendment.<sup>10</sup> The record simply does not establish, in  
20 Staff's opinion, that AZDT had any reasonable expectation of continuing to receive UNE-P at  
21 existing rates once the *TRRO* transition period began.

22 **B. Issue 2:** Whether the form of *TRRO* Amendment to be executed by  
23 Qwest and AZDT should include language allowing Qwest to back bill AZDT  
24 for the difference between the UNE-P rates AZDT paid and the corresponding  
resale rates, for the period from March 11, 2006 to the present.

25 ...  
26 ...  
27 \_\_\_\_\_  
28 <sup>8</sup> *TRRO* at para. 228.

<sup>9</sup> See Q-1, Q-2, Q-4 to Q-17.

<sup>10</sup> See Q-4.

1 The parties agreed upon the following sub-issues:

- 2 1. Qwest's claim that back billing for periods of time after the transition  
3 period is appropriate because AZDT violated the FCC's order and  
4 regulations by not transitioning from UNE-P to resold service or  
5 Qwest's QPP service by the end of the transition period or thereafter,  
6 and that violation continues to the present. Because of that ongoing  
7 violation, Qwest claims that it is entitled to recover the rate for resold  
8 service by way of back billing.
- 9 2. Qwest's claim that back billing for the post-transition period is justified  
10 under the "change of law" and "dispute resolution" provisions of the  
11 ICA.
- 12 3. AZDT's claim that such back billing is inappropriate because Qwest  
13 has not filed for and does not have authorization from the Arizona  
14 Corporation Commission to apply the resale rate by way of a back  
15 billing. Within this claim the parties will address the allegations and  
16 associated legal claims set out in Section I, paragraphs 10 through 14 in  
17 AZDT's Statement of Issues filed in this docket on April 4, 2008,  
18 although the parties do not necessarily expect that their discussions of  
19 those issues will be organized according to the listing in those  
20 paragraphs.
- 21 4. The parties may argue bad faith or refusal to negotiate in the context of  
22 the foregoing sub-issues.

23 This issue, in Staff's opinion, is similar to Issue I above. AZDT's position is that it is  
24 absolved from paying a higher rate for QPP since: (1) it would be retroactive ratemaking, (2)  
25 the parties had agreed to an "alternative arrangement", and (3) the Commission did not  
26 approve the rate to be charged by Qwest.

27 The record indicates that AZDT was relying in large part upon this Commission's  
28 decision in the DIECA arbitration<sup>11</sup> in its negotiations with Qwest with respect to the  
appropriate UNE-P rates to be charged by Qwest.<sup>12</sup> In the DIECA case, the Commission had  
found that it had authority to set Section 271 network element rates in an arbitration  
proceeding. Qwest appealed Decision No. 68440 to the United States District Court for the  
District of Arizona. The DIECA appeal was not decided until July, 2006. Once that appeal  
was decided, Qwest sent a letter to AZDT requesting that it sign the *TRRO* Amendment. For  
a variety of reasons, AZDT refused.

<sup>11</sup> *In the Matter of the Petition of DIECA Communications, Inc., dba Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket Nos. T-03632A-04-0425 and T-01051B-04-0425, Opinion and Order, Decision No. 68440 (Issued February 2, 2006) ("Decision No. 68440").

<sup>12</sup> See Q-7.

1           Once again, it is Staff's position that AZDT is obligated to pay Qwest post transition  
2 period rates for the period of time from March 11, 2006 to date ("the post-transition period").  
3 The parties did not have an agreed upon "alternative arrangement" in place. There was  
4 clearly no meeting of the minds on the arrangement that was in place. The record indicates  
5 that Qwest understood, and it conveyed this to AZDT, that it was merely maintaining the  
6 "status quo" so to speak until the issues between the parties could be resolved, and once  
7 resolved, AZDT would be subject to the provisions of the *TRO* and *TRRO*, as every other  
8 carrier in Arizona.<sup>13</sup>

9           This is not a case of retroactive ratemaking for several reasons. First, there is nothing  
10 to indicate that AZDT had a reasonable expectation that it could continue to obtain UNE-P at  
11 existing rates after the *TRO* and *TRRO* issued. In fact even the DIECA decision, upon which  
12 AZDT relies, required an expedited rate hearing in 30 days to determine "just and reasonable  
13 rates" under the FCC's new pricing standard. In addition, AZDT knew from its  
14 communications with Qwest that it had two options with respect to wholesale service from  
15 Qwest in the future, i.e., (1) it could take service from Qwest on a resale basis or (2) it could  
16 take Qwest's QPP product offering. Thus, AZDT was on notice from the start that its rates  
17 would increase under either of these options, and the amount of the increases. The record  
18 establishes that Qwest waited until the DIECA decision was decided by the District Court,  
19 because AZDT was in part relying upon that case in not entering into the *TRRO* Amendment.  
20 In Staff's opinion, this is not retroactive ratemaking. In addition, it is inappropriate for  
21 AZDT to use the DIECA case as a reason to delay, and then when a decision is finally issued  
22 by the District Court, argue that it is being subject to retroactive ratemaking.<sup>14</sup>

23           Finally, in its decision, the District Court found that the Commission could not address  
24 Section 271 network elements and rates in an arbitration. While the Commission and DIECA  
25 have appealed the District Court decision to the United States Court of Appeals for the Ninth  
26 Circuit, the Commission must abide by the District Court decision unless and until it is  
27

28 <sup>13</sup> See Q-1, Q-2 and Q-4 to Q-17.

<sup>14</sup> Ex. Q-7.

1 overturned. Further, the parties ICA contained the resale discount reviewed and approved by  
2 the Commission in the last Wholesale Pricing Docket.<sup>15</sup> Since the record demonstrates that  
3 AZDT elected this option, Qwest's position is that the Commission's approved resale  
4 discount should apply for the post-transition period. Staff believes this to be reasonable.

5 The Staff also believes that absolving AZDT of its liability in this case would only  
6 serve to encourage delay with respect to implementing changes of law in the future by  
7 carriers, in the hope that the carrier could avoid adverse or unfavorable consequences, during  
8 the interim period.

9 While Staff's position may appear to be harsh, Staff believes that the Commission  
10 could and should ameliorate the impact of the back billing upon AZDT since the parties'  
11 dispute has gone on for some time and the amounts that have accumulated are not  
12 insignificant. Qwest must share some responsibility for the delay. The Commission should  
13 require Qwest to allow AZDT to pay the agreed upon outstanding amounts over a sufficiently  
14 long period of time so that AZDT is not financially imperiled as a result of a Commission  
15 decision in Qwest's favor.

16 C. **Issue 3:** Whether the form of *TRRO* Amendment to be executed by  
17 Qwest and AZDT should include language requiring Qwest to provide notice  
18 of copper loop replacements to AZDT by certified mail, rather than by  
19 electronic mail.

20 ...

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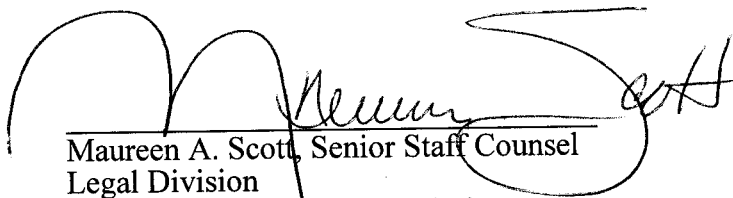
27

28 <sup>15</sup> See *In the Matter of Investigation Into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Docket No. T-00000A-00-0194.



1 At the hearing on this matter, Qwest made a significant concession by agreeing to  
2 identify the circuits impacted by any copper loop replacements and provide that information  
3 to AZDT. Staff believes that the provision of this data to AZDT in electronic format should  
4 be acceptable.

5 RESPECTFULLY submitted this 20<sup>th</sup> day of May 2008.

6  
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8   
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